MAR
ALEXANDER L. STEVAS
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No. 80-1415

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDWARD M. MURPHY, II,

Petitioner

v.

MICHAEL J. EAGEN, Individually and as a Justice of the Pennsylvania Supreme Court Who Has Responsibility for Administration of Admissions to the Bar of the Commonwealth of Pennsylvania, et al. (MICHAEL J. EAGEN, HENRY X. O'BRIEN, SAMUEL J. ROBERTS, ROBERT N.C. NIX, JR., LOUIS MANDERINO, ROLF LARSEN, JOHN P. FLAHERTY, as Individuals and as Justices of the Pennsylvania Supreme Court),

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bernard G. Segal*
James D. Crawford
Attorneys for Respondents

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Of Counsel

*Counsel of Record for Respondents

QUESTION PRESENTED FOR REVIEW

When petitioner sought only affirmance of a District Court order that respondent Justices of the Supreme Court of Pennsylvania "issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement and [the Pennsylvania Bar Admission Rules embodying that requirement]," was not petitioner's case made moot by the amendment of the accreditation rule to require receipt "without exception" of a degree from an ABA accredited law school?

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STATEMENT OF THE CASE

Petitioner is a graduate of Western State University School of Law, a law school which has never been accredited by the American Bar Association ("ABA"). In 1976, petitioner applied to the Pennsylvania Board of Law Examiners (the "Board") for permission to take the Pennsylvania Bar Examination. His application was denied because he was not a graduate of an ABA-accredited law school as required by the Supreme Court of Pennsylvania's Rule 8-C-2. Petitioner appealed the Board's decision to the Supreme Court of Pennsylvania, which denied relief without opinion.

In 1977, petitioner instituted suit in the United States District Court for the Eastern District of Pennsylvania

attacking the constitutionality of Rule 8-C-2 on due process and equal protection grounds. The court concluded that the accreditation requirement was rationally related to a valid state objective and did not violate any of petitioner's constitutional rights. Thus, the complaint was dismissed for failure to state a cause of action for which relief could be granted. Murphy v. State Board of Law Examiners, 429 F. Supp. 16 (E. D. Pa. 1977). Petitioner did not appeal the decision.

Petitioner then re-applied for permission to sit for the Pennsylvania Bar Examination. The Board's denial was again affirmed by the Pennsylvania Supreme Court. Appeal of Murphy, 482 Pa. 43, 393 A.2d 369 (1970). Petitioner filed an appeal to this Court. The

appeal was dismissed for want of jurisdiction and, treating the appeal papers as a petition for certiorari, the Court denied certiorari. 440 U.S. 901 (1979).

On August 6, 1979, petitioner instituted his second federal court action in the Eastern District of Pennsylvania, again alleging that the application of Pennsylvania's requirement that candidates for admission to the bar be graduated from an ABA-accredited law school, now contained in Rules 203 and 205 of the Pennsylvania Bar Admission Rules, violated his constitutional rights. Respondents moved to dismiss the Complaint on res judicata grounds, and petitioner moved for summary judgment. Without ruling on either motion, the District Court requested the parties to enter into a stipulation of facts (28a-30a) which was filed on March 13,

1980.[1] On April 8, 1980, the District

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1. Petitioner's original federal complaint had alleged a violation of the Equal Protection Clause in that he had been treated differently from others who had been admitted to the Pennsylvania bar although they had not graduated from an ABA-accredited law school. The Complaint in this case alleged a due process violation in that the Pennsylvania Supreme Court had never promulgated standards for the "waiver" of the ABA-accreditation requirement.

   Although petitioner's Complaint alleged that the Pennsylvania Court had "waived" the requirement as to one Thomas Sylk "and others" (7a-8a, ¶6), respondents had not yet filed an answer in which that allegation could be admitted or denied at the time the District Court granted summary judgment for petitioner. The Stipulation of Facts entered by the parties stated only that Thomas Sylk was graduated from a law school which was not accredited by the ABA at the time, that the school was merged with another unaccredited law school, that the successor school was accredited by the ABA in 1972 (29a, ¶8), and that Sylk was finally permitted to sit for the Pennsylvania bar examination by order of the Supreme Court of Pennsylvania in 1977 (30a, ¶10). There was no other factual basis for the decision of the District Court.

Court granted petitioner's motion for summary judgment and ordered respondents "to issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement...." (19a).

Respondents appealed to the United States Court of Appeals for the Third Circuit. While that appeal was pending, the Supreme Court of Pennsylvania amended the Pennsylvania Bar Admission Rules to make it explicit that no exceptions to the accreditation rule would be recognized. Accordingly, respondents brief on appeal urged reversal of the decision of the District Court not only on the grounds that the claim was barred by res judicata and that the court erred in granting summary judgment

in the face of contested issues of material fact, but also on the ground that the case was moot.

In a Judgment Order dated November 10, 1980, the Court of Appeals held that the amendment of the accreditation rule rendered the appeal moot, and ordered that the appeal be dismissed and the case remanded to the District Court with instructions to vacate the judgment and dismiss the case as moot. Reargument was denied.

Petitioner seeks a Writ of Certiorari to review this order of the Court of Appeals.

REASONS FOR DENYING THE WRIT

There are three clear reasons for denying certiorari in this case. First, there can be no dispute that litigation should be dismissed if the case has become moot; the only question is the factual one of whether this specific case is moot. Therefore any decision in this case, should the Court grant certiorari, would be of limited precedental value. Second, the decision of the Court of Appeals is clearly correct and in conflict with neither any decisions of this Court nor any decisions of other courts of appeals. Finally, since the District Court erred when it failed to dismiss the Complaint on res judicata grounds, there is another independent basis for upholding the judgment of the Court of Appeals

which is so clear that a decision for petitioner in this case would give him no real relief.

I. This Case Presents No Significant Question Concerning the Rule that Federal Courts Should Not Decide Moot Cases.

Article III of the Constitution imposes a "threshold requirement ... that those who seek to invoke the power of federal courts must allege an actual case or controversy." O'Shea v. Littleton, 414 U.S. 488, 493 (1974); U.S. Const., Art. III, §2, cl. 1. Moreover, the firmly established rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 400 (1975); Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974); Roe

v. Wade, 410 U.S. 113 (1973); SEC v. Medical Commission for Human Rights, 404 U.S. 403 (1972); United States v. Munsingwear, Inc., 340 U.S. 36 (1950). Thus, the federal courts have avoided giving advisory opinions by refusing to exercise jurisdiction over cases which are no longer live.

Once the Court of Appeals determined that the amendment of the state Rule mooted respondents' appeal, it acted in accordance with the long-established procedure of the federal courts in vacating the judgment below and dismissing petitioner's case. Crowell v. Mader, 100 S. Ct. 25 (1979); Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979); Hopper v. Barnett, 439 U.S. 1041 (1978); United States v. Munsingwear, Inc., supra. This rule applies even where an appellant moots

the case by his own action. Board of Regents v. New Left Educational Project, 414 U.S. 807, rev'g, 472 F.2d 218 (5th Cir. 1973). Thus, the appellate court's dismissal of the action was required by established precedent.

In fact, the present case does not deal with the question of what should be done if a case becomes moot. Rather, the question presented is merely whether the Court of Appeals correctly ruled that the case had become moot upon the amendment of the relevant Pennsylvania Bar Admission Rules. There is no suggestion in the Petition for Certiorari that there is a need for clarification of the meaning of mootness or that the facts of this case are likely to recur. Indeed, since the Supreme Court of Pennsylvania had renounced any possible "waiver" policy in its 1979

decisions in In re Ferriman, 487 Pa. 45, 408 A.2d 844 (1979), and In re Kartorie, 486 Pa. 500, 406 A.2d 746 (1979), and had prohibited "waiver" of the ABA-accreditation policy by its 1980 amendment to Rule 203, it is unlikely that any case other than petitioner's challenging the alleged pre-1979 practice remains open to be controlled by a decision of this Court. Nor does petitioner suggest that a similar mootness problem exists in any other jurisdiction to which this Court's decision would apply, or that the decision below conflicts with any decision of this Court or the courts of any other circuit. In other words, none of the criteria set forth in Rule 17 of this Court's Rules is met.

A review of the cases indicates that since this Court announced

the rule that moot cases should be dismissed in United States v. Hamburg-American Co., 239 U.S. 466 (1916), it has never granted certiorari simply to determine whether a given case is moot. Apart from rare cases like Duke Power Co. v. Greenwood County, 299 U.S. 259 (1936), and United States v. Munsingwear, 340 U.S. 36 (1950), which either enforced the Hamburg-American rule or defined its perimeters, this Court has dealt with the mootness issue when a change of circumstances intervened between the decision below and the disposition of the case by the Court. Except in the most unusual of circumstances, absent here, there is no reason for this Court to reexamine a decision by a court of appeals that the case is already moot at that level.

II. This Case Was Plainly Mooted by the Adoption of the Amendment to the Pennsylvania Bar Admission Rules.

In any case, the Court of Appeals properly decided that this case was moot in light of the adoption of the amendment to Rule 203(2) of the Pennsylvania Bar Admission Rules explicitly setting forth the standards for waiver of the accreditation requirement. Petitioner's position in the District Court was that respondents "must establish standards to be followed in the waiver procedure." (17a). On the basis of a single exception to the rule, the District Court assumed a waiver policy existed, and ordered respondents "to issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement." (19a). While the appeal

was pending in the Court of Appeals, the Supreme Court of Pennsylvania amended its rules to make it clear that the accreditation requirement would be enforced in all circumstances; "waivers" of the requirement would not be permitted. Petitioner has received the ordered relief. Thus, the case has "lost its character as a present, live controversy," and should be dismissed as moot. Hall v. Beals, 396 U.S. 45, 48 (1969).

Petitioner suggests that the amendment to the Pennsylvania Bar Admission Rules was not enough to comply with the District Court's order since it offered no basis for determining whether he might come within the alleged "waiver" policy. But even if the fact that Thomas Sylk had been permitted to sit for the bar examination indicated that the Supreme Court of Pennsylvania

had had a "waiver" policy under the pre-existing Supreme Court Rules relating to bar admission, the new Pennsylvania Bar Admission Rules which became effective on November 4, 1977, before petitioner's unsuccessful appeal to the Supreme Court of Pennsylvania, are not alleged to have been subject to any such "waiver." Moreover, the Supreme Court of Pennsylvania had held that no exceptions to the ABA-accreditation requirement would be permitted under the new bar admission rules even before petitioner filed his motion for summary judgment asking that such a "waiver" policy be defined by that court. See In re Ferriman, supra; In re Kartorie, supra. Thus, there was no "waiver" policy whose standards respondents could have announced in compliance with the District Court's order except for the

absolute prohibition against exceptions to the ABA-accreditation requirement.

What petitioner seems to believe the order of the District Court required of respondents was the issuance of guidelines to explain the granting of permission to sit for the bar examination to a law student whose school was only accredited after his graduation even though that explanation would apply only to that case. In addition, petitioner would ask that he be admitted under the same rule even though his law school has never become accredited and even though his case was decided by the Supreme Court of Pennsylvania under new Rule 203. In other words, petitioner interprets the District Court's order as giving him an opportunity to be admitted to the Pennsylvania bar under

standards which no longer applied to anyone else at the time his application was rejected, if they ever did. Nothing in the District Court's order suggests that it granted such broad relief.

Moreover, regardless of the adequacy of the relief ordered below or of respondents' compliance therewith, the ruling of the Court of Appeals was correct because a cause of action based upon a statute or regulation may be mooted if that statute or regulation is amended after the filing of the complaint. See Kremens v. Bartley, 431 U.S. 119 (1976); Hall v. Beals, 396 U.S. 45 (1969). The meaning of the amended rule and petitioner's rights thereunder could not be any clearer. Thus, the enactment of a superseding regulation which satisfies petitioner's attack on the prior "standardless" regulation

simply moots the case.[2]

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2. It is true that even full compliance with the judgment below or the passage of an amended statute may not moot a case if the questioned conduct is likely to recur. See United States v. Concentrated Phosphate Export Association, Inc., 393 U.S. 199 (1968); United States v. W.T. Grant Co., 334 U.S. 629 (1953). The amended regulation in this case, however, comports with respondents' recent decisions that the accreditation requirement will apply "without deviation or exception." See In re Ferriman, supra; In re Kartorie, supra. Petitioner does not allege that any "waivers" have been granted since these decisions. Moreover, this Court should not assume that the highest court of the Commonwealth of Pennsylvania will not strictly enforce the explicit standards set forth in its decisions and regulations. It can be said with assurance that, even assuming a waiver policy did exist in the past, there is no "reasonable expectation" that it will recur in the future. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); SEC v. Medical Commission for Human Rights, 404 U.S. 403, 406 (1972). Mere speculation that the challenged conduct will recur is insufficient to establish the "immediacy and reality" that Article III demands. See Golden v. Zwickler, 394 U.S. 103, 108-10 (1969).

III. In addition, Petitioner's Claim Is Plainly Barred by Res Judicata.

Even if the mootness issue were in some sense worthy of the attention of this Court, no decision of the Court is likely to affect the outcome of this case since petitioner's claim is so plainly barred by the doctrine of res judicata. Having litigated the same facts and closely related legal theories in his first unsuccessful federal litigation, petitioner cannot retry the same issues by a minor change in his legal theory.

In Commissioner v. Sunnen, 333 U.S. 591 (1948), this Court explained the nature and operation of the doctrine of res judicata:

"The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."
Cromwell v. County of Sac, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata," 38 Yale L.J. 299; Restatement of the Law of Judgments, §§ 47, 48." 333 U.S. at 597. (Emphasis added.)

The Court has recently echoed these principles in Montana v. United States, 440 U.S. 147, 153-54 (1979), in which it reemphasized the salutary effects of the doctrine of res judicata.

Thus, the federal courts have held that a plaintiff cannot "split" his cause of action into various claims, all dependent on the same underlying rights, and pursue those claims seriatim. See, e.g., Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), cert. denied and appeal dismissed, 423 U.S. 908 (1975); Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 470 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951); 1B J. MOORE, FEDERAL PRACTICE §0.410 [2]; see also Gulf Oil Corp. v. Federal Power Commission, 563 F.2d 588, 602 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978).

Petitioner asserted below that the doctrine of res judicata did not bar his present suit because his due process claim herein stated a different "cause of action" than the cause of action already dismissed in the first federal suit. That assertion ignores the specific allegations of the first complaint as well as the applicable precedents relating to the definition of a "cause of action."

As the court aptly noted in Donegal Steel Foundry Co. v. Accurate Products Co., 516 F.2d 583, 588 n.10 (3d Cir. 1975), the term "'[c]ause of action' cannot be precisely defined, nor can a simple test be cited for use in determining what constitutes a cause of action for res judicata purposes." Nonetheless, the case law makes clear that

the res judicata effect of a prior determination cannot be avoided by "'clothing the claim in different garb.'" Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 653 (N.D. Cal. 1978), quoting In re Orbitec Corp. v. Askew, 392 F. Supp. 633, 636 (S.D.N.Y. 1975); see also Aerojet-General Corp. v. Askew, supra, 511 F.2d at 718; Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964).

Here, it is patent that petitioner's present suit implicates the identical cause of action as did his previous federal suit. It is clear that petitioner challenges the identical alleged "liability creating conduct" of respondents as he did in the prior litigation, that is, their refusal to permit him to sit for the Pennsylvania Bar Examination.

As has previously been noted, petitioner specifically claimed in his first federal suit filed on February 7, 1977 that the practice of the State Board of Law Examiners in enforcing Rule 8-C-2 had interfered with his right "to be similarly treated as others under like circumstance" and "to be free from arbitrary and unreasonable action on the part of the Bar admitting authorities." Specifically, he claimed even then that the ABA-accreditation requirement had been "relaxed" in other instances, that under Rule 8-C-2 the Board was permitted "to treat applicants similarly situated in a different manner," and that the Board was given the ability to extend the rule in an "unwarranted and over-broad fashion" and to make it "vague, uncertain and indefinite."

Thus, the essential factual predicate for petitioner's claim in this

case is the same as that raised in his prior suit. Accordingly, the order of dismissal there bars this suit. See Berlitz Schools of Languages Inc. v. Everest House, 619 F.2d 211, 215 (2d Cir. 1980); Ellentuck v. Klein, 570 F.2d 414, 428 nn. 22, 23 (2d Cir. 1978).

Under these circumstances, petitioner's claim is as clearly barred by the doctrine of res judicata as it is moot.

CONCLUSION

For all of these reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

Bernard G. Segal
James D. Crawford
Attorneys for Respondents

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Of Counsel

Dated: March 23, 1981

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Of Counsel

Dated: March 23, 1981